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OCT 17 1975

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

KENT FRIZZELL, ACTING SECRETARY OF THE INTERIOR,
ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL.,
Petitioners

v.

SIERRA CLUB, INC., ET AL., *Respondents*

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF**

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association.

**AS AMICI CURIAE IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI.**

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Date: October 17, 1975

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association respectfully move for leave to file the attached brief *amici curiae*.

The consent of the attorney for the Respondents was requested but refused, and the consent of the attorneys for the other parties has been requested. Five of those

attorneys have consented. No responses have been received from the others.

The interest of the Movants in this case arises because many of the members of each of the *Amici* either purchase or plan to purchase coal produced in the area affected by the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton, et al.*, 514 F.2d 856 (D.C. Cir. 1975), or purchase power and energy at wholesale from suppliers who purchase or plan to purchase coal produced in such area. Such members of the Movants are consumer-owned utilities, most of them relatively small. They are either publicly-owned utilities or non-profit, cooperative rural electric associations. The latter are owned and controlled by their consumer-members. Their sole function is to obtain electric power and energy at the lowest possible costs. The cooperatives furnish service in sparsely settled rural areas and have very few large commercial or industrial loads.

In view of the unique nature of the problems faced by the Movants as a result of the Court of Appeals' decision, their interests in this case will not be fully presented by any other party.

Respectfully submitted,

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INDEX

	Page
I. DESCRIPTION AND INTEREST OF AMICI CURIAE	2
II. REASONS FOR GRANTING THE WRIT	13
III. CONCLUSION	14

CITATIONS

CASES:

<i>Aberdeen & Rockfish R.R. v. SCRAP</i> , No. 73-1966, decided June 24, 1975	13
<i>Environmental Defense Fund, Inc. v. Armstrong</i> , 487 F. 2d 814 (9th Cir.), affirming 356 F. Supp. 131 (N.D. Cal. 1973)	13
<i>Jicarilla Apache Tribe of Indians v. Morton</i> , 471 F. 2d 1275 (9th Cir. 1973)	13
<i>Sierra Club v. Callaway</i> , 499 F. 2d 982 (5th Cir. 1974)	13
<i>Sierra Club v. Morton</i> , 514 F. 2d 856 (D.C. Cir. 1975)	2, 3
<i>Sierra Club v. Stamm</i> , 507 F. 2d 788 (10th Cir. 1974)	13
<i>Trout Unlimited v. Morton</i> , 509 F. 2d 1276 (9th Cir. 1974)	13

STATUTE:

National Environmental Policy Act of 1969, 42 U.S.C. § 4331 et seq. (1970)	13
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MISCELLANEOUS:

Petition for Writ of Certiorari, <i>Frizzell et al. v. Sierra Club et al.</i> , Docket No. 75-552, filed October 9, 1975, at 8	1, 11, 14
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BRIEF

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association.

**AS AMICI CURIAE IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI.¹**

This brief is submitted in support of the petitions of Kent Frizzell, et al., and of American Electric Power System, et al., for a writ of certiorari to review the

¹ The *Amici* are referred to hereafter as follows: AMERICAN PUBLIC POWER ASSOCIATION—"APPA"; COLORADO RURAL ELECTRIC ASSOCIATION—"COLORADO"; MID-WEST ELECTRIC CONSUMERS ASSOCIATION, INC.—"MID-WEST"; MONTANA ASSOCIATED UTILITIES

judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club v. Morton*, et al., 514 F.2d 856 (D.C. Cir. 1975).

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

American Public Power Association is the national association of more than 1400 local, publicly-owned electric utilities in 48 states, Guam, Virgin Islands, American Samoa and Puerto Rico. A number of these electric systems are large, but most are small cities, towns and villages. A large number, particularly in the Western states, are dependent upon the production of coal in the Northern Great Plains and future planning depends upon the availability of such coal. A sizeable number operate their own generating units requiring that coal. Many others purchase power at wholesale from suppliers which are dependent upon the availability of such coal.

Illustrative of the crippling problems faced by the APPA members dependent upon Western coal are the following three instances:

Muscatine Power & Water, the agency of the city of Muscatine, Iowa which operates the municipal electric system, is planning the installation of a new fossil-fired generating unit to be in commercial operation January 1, 1982. It has surveyed the major coal suppliers to

—"MONTANA"; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION—"NRECA"; NEBRASKA RURAL ELECTRIC ASSOCIATION—"NEBRASKA"; NORTH DAKOTA ASSOCIATION OF RURAL ELECTRIC COOPERATIVES—"NORTH DAKOTA"; NORTHWEST PUBLIC POWER ASSOCIATION—"NORTHWEST"; SOUTH DAKOTA RURAL ELECTRIC ASSOCIATION—"SOUTH DAKOTA"; WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION—"WASHINGTON"; AND WYOMING STATE RURAL ELECTRIC ASSOCIATION—"WYOMING".

determine the cost and availability of low sulphur coal in the quantities required to operate the new plant. It encounters the same problem time and time again. The coal suppliers indicate that the uncertainty of the outcome of *Sierra Club v. Morton* prevents them from seriously discussing or making any commitments with respect to low sulphur coal from their strip mining operations in the Western states.

The Board of Public Utilities of Kansas City, Kansas, is now purchasing approximately 150,000 tons of coal from Wyoming annually. It is estimated that its need for Western coal will increase to 850,000 tons annually by 1979 when its new Nearman Creek Power Station is scheduled to be put in service at that time. It has been unable to obtain contracts to date that will insure the coal necessary to satisfy its requirements. It would appear certain that the required coal cannot become available by 1979 unless *Sierra Club v. Morton* is overturned.

Another member of APPA which would be severely injured if *Sierra Club v. Morton* were permitted to stand is Nebraska Public Power District which has one of the largest electric systems of any of the APPA members. It furnishes electric service at retail to 260 municipalities and communities and supplies at wholesale the total requirements of 74 municipalities, public power districts and rural electric cooperatives. In the aggregate these customers account for approximately one-half of the electrical power load of the State of Nebraska. Also 20 municipal electric systems with generating facilities of their own have interconnection agreements with Nebraska Public Power District pursuant to which they may purchase part of their requirements from the District.

The District now has under construction a 650 MW coal burning power plant. The estimated construction cost of the plant is approximately \$288 million and it has already obligated approximately \$195 million in contracts and commitments for engineering, equipment and construction of the project and has already expended approximately \$95 million. Commercial operation of the plant was originally scheduled for mid-1977 but because of environmental delays is now planned for mid-1978.

The District plans to use low sulphur coal to minimize the environmental impact at the generating station and has entered into a coal supply agreement with Atlantic Richfield Company to purchase low sulphur coal for the new station from Atlantic Richfield's planned coal mining operation in Campbell County, Wyoming. The injunction in effect in this case is stopping the construction and development of the Atlantic Richfield mine.

Any delay in the operation of the new station will result in unnecessary expense to the District and its rate payers. This expense, while difficult to estimate with any degree of accuracy, would be enormous. If the District does not obtain the low sulphur coal from Campbell County, Wyoming, there is a substantial risk that its customers would be subject to electric power curtailments resulting in brown-outs and black-outs.

Mid-West Electric Consumers Association, Inc., with headquarters at Denver, Colorado, is the regional service organization of the rural electric cooperatives and publicly-owned electric systems located in the nine states comprising the Missouri Basin: Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota,

South Dakota and Wyoming. Mid-West is composed of approximately 250 systems, which serve almost 1,500,000 consumers. It was formed to obtain an adequate supply of low-cost and dependable electric power for these groups, and generally to promote the interests of electric consumers in the region.

A number of the members of Mid-West are located in or close by the Northern Great Plains. A very large percentage of the other members will also soon be dependent upon coal produced in that area. Until several years ago these members were able to purchase their power and energy requirements from the Bureau of Reclamation since they are preference customers under the Flood Control Act of 1944, which governs the sale of Missouri River power. The power sold by the Bureau to those members is generated at the government-owned dams located on the main stem of the Missouri River.

For the past few years it has been impossible for most of the members who are Bureau customers to obtain all of their requirements from that source because all of the available power has been placed under contract. In order to obtain an additional source at a reasonably low cost, the members banded together to organize generating and transmitting organizations. Examples of such organizations are Basin Electric Power Cooperative, Missouri Basin Municipal Power Agency, Tri-State Generation and Transmission Association and Wyoming Municipal Electric Joint Power Board. These organizations have joined with Western Fuels Association, Inc., and others in submitting a brief *amicus curiae* in this case. That brief explains the development of the Laramie River Project, in which the four organizations mentioned im-

mediately above are participants. That brief also explains the injury which will result to the participants in the Laramie River Project if the coal from the Northern Great Plains Area is not made available for use in the Laramie River Project by the time it is ready to go into commercial operation. Almost all of Mid-West's members will suffer serious injury if that project is not able to operate immediately upon completion because of lack of coal. It is highly probable that brown-outs and black-outs would result. Rationing of power would be a distinct possibility.

Other members of Mid-West purchase power from suppliers who are dependent upon coal purchased in the Northern Great Plains.

It must be emphasized that not only do Mid-West members operate on a strictly nonprofit basis but they are owned and controlled by their consumers. Mid-West wishes to raise its voice in support of the interest of those consumers. They are the ones who will suffer if the injunction now in effect is not lifted shortly.

Colorado, Montana, Nebraska, North Dakota, South Dakota, Washington and Wyoming are state-wide organizations, the members of which are borrowers from the Rural Electrification Administration. Each of them operates at the state-wide level in the same fashion as Mid-West does on a regional level. The members of each are deeply concerned about the possibility of brown-outs and black-outs resulting from the lower court injunction. Their worry is that in addition to the threat of blackouts and brownouts the cost of electricity to their ultimate consumer members will be greatly increased if the injunction is not set aside. Most of their members are also dependent upon

Basin Electric Power Cooperative and the Laramie River Project for all of their power requirements in excess of those which can be made available by the Bureau of Reclamation.

National Rural Electric Cooperative Association is the trade association of the rural electric cooperatives which have been chiefly financed by the Rural Electrification Administration, an agency of the United States. It has almost one thousand members located in 46 states serving approximately 25,000,000 ultimate consumers in rural areas. Approximately 180 of such members are located in Wyoming or adjoining states. Many of the members, located both within and without such states, operate coal-fueled generating plants which plan to purchase coal from mines to be located in the Northern Great Plains. A very large number buy power and energy at wholesale from suppliers proposing to purchase coal produced in that area.

The concerns of the members of NRECA are similar to those of the Mid-West and statewide organizations' members. Almost all of the rural electric cooperatives in Wyoming and surrounding States are members of NRECA. There are also a few members in other states which generate their own power and are dependent upon coal from the Northern Great Plains Area. There are a very large number of NRECA members who buy their electric power and energy requirements from other suppliers which are to a substantial extent dependent upon such coal.

The Environmental Impact Statement for the Eastern Powder River Coal Basin considered the mining plans of four mines, the approval of which is now being held up by the injunction. There is also pending

before the Department of Interior the mining plans for five additional mines, for which a draft Environmental Impact Statement will be issued this Fall. Also pending is an application for the extension of an existing mine. A draft Environmental Impact Statement for this mine was issued on March 24, 1975, with the final statement expected to be issued in the near future. The companies submitting the mining plans referred to in these paragraphs were Amax Coal Company, Atlantic Richfield Company, Carter Oil Company, Ker-McGee Corporation, Peabody Coal Company, Sun Oil Company and Wyodak Resources Development Corporation. The development of all these plans is, of course, stopped by the injunction.

Coal from the Belle Ayr South Coal Mine of Amax Coal Company is sold to: Interstate Power Company, Iowa Power & Light Company, Kansas Power and Light Company, Public Service Company of Colorado and South Western Electric Power Company.

Coal from Atlantic Richfield mines is sold to: Oklahoma Gas and Electric Company and South Western Public Service Company.

Coal from the Carter Oil Company mines is sold to: Indiana and Michigan Electric Company.

Coal from the Kerr McGee Corporation mines is sold to: Arkansas Power and Light Company, Arkansas and Missouri Power and Light Company, Central Louisiana Electric Company, Inc., Gulf States Utilities Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Services, Inc.

Coal from the Wyodak Resources Development Company mines is sold to: Black Hills Power and Light Company.

All of the electric utility companies listed above sell electric power to members of NRECA and most of them also sell electric power to members of APPA. In addition, Dairyland Power Cooperative, a member of NRECA, buys coal from the Belle Ayr South Coal Mine of Amax Coal Company and Nebraska Public Power District, a member of APPA, buys coal from Atlantic Richfield mines.

NRECA's members operate in sparsely settled areas. The average consumer density of all the rural electric systems in the country is 3.9 consumers per mile of distribution line. This contrast with an average consumer density of 35 consumers per mile experienced by the Class A & B electric utilities in the nation. The average consumer density of the NRECA members in Wyoming and nearby states is even much lower than is the national average. Those densities are as follows: Colorado 3.0; Idaho 2.9; Kansas 1.8; Montana 1.7; Nebraska 1.8; North Dakota 1.3; South Dakota 1.5; Utah 2.7 and Wyoming 1.7.

More than half of the total operations and maintenance expense of the rural electric systems is represented by the wholesale cost of power and energy. Thus the impact on the small systems, serving low consumer density areas with the resultant very large investment in facilities per consumer, would be tremendous if the low cost western coal is not made available to them.

Examples of the extremely serious problems which would be created for NRECA members which generate their own power are the situations which would be

faced by Cajun Electric Power Cooperative, Inc. and Dairyland Power Cooperative if the decision of the lower court remains in effect. The impact on Cajun is discussed in the brief *amici curiae* filed by Western Fuels Association, Inc., et al. in this proceeding.

Dairyland Power Cooperative is a large generating and transmission cooperative with headquarters at La Crosse, Wisconsin. The coal requirements of its Alma 6 generating unit are to be supplied by Amax Coal Company. If the latter is not permitted to supply coal to Dairyland's Alma 6 generating unit, Dairyland might possibly be able to install scrubbers and use midwest coal of higher sulphur content. The cost of the scrubbers would be \$3.3 million per year and the additional cost of coal would be approximately \$2,250,000 per year. There is no capacity in the power pool in which Dairyland is a participant from which Dairyland could purchase power to be used in lieu of the power proposed to be generated at Alma 6. Other companies in the pool are also depending upon the Wyoming coal. If Dairyland were forced to rely on purchases of power from other members of the pool after 1978, it would appear that Dairyland's members would be subjected to power outages.

Dairyland possibly could install oil-fired generation. However, in view of the oil supply shortage it would not appear to be a wise choice. The oil requirement would be approximately 115 million gallons. The added fuel cost would be approximately \$24.5 million per year.

It also should be pointed out that Dairyland does not at this time have any generating plants scheduled

for retirement, nor does it have any retired plants which could be reactivated. The construction of a nuclear plant would require a lead time of at least ten years. In short, Dairyland's Alma 6 plant, from any practical viewpoint, is entirely dependent upon western coal.

Northwestern Public Power Association is a regional association, the members of which are municipalities, public utility districts, and rural electric cooperatives, similar to Mid-West. Certain of its members are also dependent upon the availability of coal from the Northern Great Plains.

Each of the *Amici* fully supports an aggressive, effective environmental protection program. Certain of their members have taken the lead in cooperating with environmentalists in developing effective programs to harmonize strip mining and electric power generation with sound standards of environmental protection.

The *Amici* agree that the Interior Department has the responsibility in passing upon proposed mining plans to insist upon the most effective practical environmental protection measures. They believe that the Interior Department is doing this. They agree that Interior should prepare site-specific environmental impact statements and, where appropriate, broader impact statements such as the Eastern Power River Coal Basin Impact Statement based on factors described in the petition of the Federal Petitioners at pages 7 and 8.

However, the Court of Appeals, in attempting to force the government to engage in regional planning of

an area determined not by the government but by the respondents, has opened the door to a dangerous situation. Under the opinion of the Court of Appeals, anyone with an interest in a vaguely-defined area of the country could bring a halt to unrelated governmental activities, merely on the basis of geographical location within a self-defined province, until a provincial environmental impact statement has been issued and its adequacy judicially determined. This could be accomplished without bothering to challenge the adequacy of impact statements covering related regions within the area. Just as many members of the *Amici* are being hindered in their efforts to obtain necessary fuel and energy by the instant case, so too may every member, wherever located, be injured in the future by similar challenges.

What makes these future roadblocks so difficult to foresee, and thus plan for, is their arbitrary nature. The requirement of impact statements for inter-related projects can be understood, and therefore taken into account during planning. That requirement is reasonable and causes no problems for the *Amici*. Indeed they encourage such environmental planning. However, no amount of foresight could have predicted the need for a provincial impact statement for the Northern Great Plains, especially in view of the Proposed Federal Coal Leasing Program and Eastern Powder River Basin Impact Statements. Decisions on sources of fuel and energy must be made years in advance in order to insure their availability. In allowing private individuals to determine the boundaries for provincial impact statements the court below has introduced a wild card into the deck which could appear at any time,

without warning, to prevent these publicly and consumer-owned utilities, as well as investor-owned utilities, from providing electric power to the people they serve.

II. REASONS FOR GRANTING THE WRIT

The Federal-Petitioners and the Intervenor-Petitioners presented four basic reasons for granting the writ. The *Amici* fully concur with the reasons presented by the Petitioners, namely: (1) this case is an extremely important interpretation of the National Environmental Policy Act¹; (2) the decision below is in conflict with the decision of this Court in *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures*, No. 73-1966 (June 24, 1975) (SCRAP II); (3) the decision below is in conflict with five recent Courts of Appeals decisions in the Fifth, Ninth, and Tenth Circuits²; and (4) the decision below was incorrect in not affirming the judgment of the District Court that since there was no existing or proposed regional federal program for the development of coal in the area named in the complaint, therefore, a regional environmental impact statement was not required by the National Environmental Policy Act.

¹ 42 U.S.C. 4321, 4331-4335, 4341-4347.

² *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275 (9th Cir. 1973); *Environmental Defense Fund, Inc. v. Armstrong*, 487 F.2d 814 (9th Cir.), *affirming* 356 F. Supp. 131 (N.D. Cal. 1973); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

III. CONCLUSION

For the foregoing reasons and those presented in the petitions of the Federal and Intervening Petitioners the petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: October 17, 1975